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IN THE

Supreme Court of the United States

October Term, 1961
No. [redacted] 113

CHARLES CHRISTOPHER CAMPBELL,
CHARLES WILLIAM LANG and
THELMA ADELE ENSOR,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition for a Writ of Certiorari to The Supreme Court of Pennsylvania

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA

DANIEL W. SHOEMAKER,
District Attorney,
York County,
JOHN T. MILLER,
First Assistant District Attorney,
LEWIS H. MARKOWITZ,
Assistant District Attorney,
EARL R. DOLL,
Assistant District Attorney,
Counsel for Respondent.

Court House
York, Pennsylvania

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 961 October Term, 1961

Charles Christopher Campbell, Charles William Lang and Thelma Adele Ensor,
Petitioners

v.

Commonwealth of Pennsylvania

On Petition for a Writ of Certiorari to
The Supreme Court of Pennsylvania.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA

OPINIONS BELOW

The Supreme Court of Pennsylvania on February 13, 1962, denied an allowance of an appeal to the Petitioners from an opinion of the Superior Court of Pennsylvania as reported in 196 Pa. Superior Court 386, 175 A. 2d 324 (1961).

JURISDICTION

Jurisdiction, as stated in Petitioners' Brief, is under 28 U.S.C. Sec. 1257 (3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Stated in Petitioner's Brief.

QUESTIONS PRESENTED

As stated in Petitioners' Brief.

STATEMENT OF THE CASE

The case as stated in Petitioners' Brief is substantially correct. However, defense counsel at no time questioned the legality of the search warrant. Regarding the search warrant, defendant's counsel stated, "I am not questioning the validity of it now. I am attempting to show bias and prejudice on the part of this witness." (66a) As a matter of fact, the Commonwealth of Pennsylvania offered to show probable cause for issuance of the search warrant. Defense counsel at the time contended it was "not the issue".

ARGUMENT

The first question is whether or not the search warrant which was the basis of the arrest was proper.

It is conceded that the Complaint and the search warrant based thereon would be handled differently since the decision of *Mapp vs. Ohio*, 367 U.S. 643, yet there is little in the facts of the present case to grant the Petitioners' request. Even the facts are much different than in the case of *Mapp v. Ohio*. In that case there was serious doubt as to whether a search warrant had been issued, and if it had, there was no question that it had not been issued for the evidence which was obtained.

In the present case, there was a Complaint for a search warrant; a search warrant issued for a search of abortion instruments, exactly the type of instruments found during the search. Defense counsel did not object to illegality of the search warrant; he objected to the fact that the officer may have been biased or prejudiced in obtaining the warrant. Even assuming the officer was biased or prejudiced this would not be fatal to the proceedings, so long as he acted properly. The Commonwealth of Pennsylvania offered to show probable cause for the issuance of the search warrant; however, defense counsel conceded that was not the issue.

The search which netted exactly the type of instruments as described in the search warrant certainly indicates probable cause did exist and that at that time

the Commonwealth of Pennsylvania was in a position to prove probable cause did in fact exist. Nothing in the case indicates any illegality in the issuance of the search warrant. The law of search and seizure as it existed at the time of trial was properly ruled upon by the judge.

Should the case of *Mapp v. Ohio*, supra, be applied retrospective and, as a practical matter if it is retrospective, where does the retrospective effect cease? The constitutional purpose of *Mapp v. Ohio* is to prevent the use of evidence seized by an illegal search and seizure. The decision does not make the law retrospective, and consequently, if the Court had wanted this new rule to be retrospective in application, it would have so specified in clear and unmistakable terms. It is somewhat apparent that the *Mapp v. Ohio* decision is one of deterrence. That is, it is a guide for proper police methods. There is nothing in the record to indicate it is to be retroactive. Instead, the Court uses language indicating that it is prospective. Note the following from *Mapp v. Ohio*:

> "*Presently*, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may . . .
>
> "If the fruits of an unconstitutional search *had been* inadmissible in both state and federal courts, this inducement to evasion (the use of those 'fruits' in a state prosecution), would have been sooner eliminated.
>
> "Federal-state cooperation in the solution of crime under constitutional standards will be pro-

moted, if only by recognition of their *now* mutual obligation to respect the same fundamental criteria in their approaches.

"Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the states . . . we can *no longer* permit that right to remain an empty promise."

In *Griffin v. Illinois,* 351 U.S. 12 at page 25, the Court stated the following concerning new principles as enforced by the Supreme Court of the United States: "for sound reason law generally speaks prospectively". This is a sound and most sensible rule inasmuch as confusion, consternation and chaos would result if new and controlling principles of law would be applied retroactively. Retroactivity of the new rule would certainly open the floodgates of litigation, both civil and criminal, and petitioners will swamp the courts with unprecedented appeals.

The facts in the present case manifest this very clearly. These defendants are now objecting to legality of a search warrant which by inference they admitted at the trial was legal. This they are pleading on the *Mapp v. Ohio* decision. This is a clear indication of the extreme cases which would appear before all the courts should the *Mapp* decision be applied retroactively. Only a prospective application of the rule will permit fairness and justice to all. Any retroactive application of the new principle will be unwise and cannot be fairly administered and applied.

The second question Petitioners argue is a question of fact. The jury below on the evidence produced

by the Commonwealth found the defendants guilty as charged. Two witnesses who were duly subpoenaed by the Commonwealth did not honor the same, being nonresidents at the time. A third witness could not be located, yet, strangely, after conviction of defendants all three offered affidavits TO THE DEFENSE in support of a new trial.

As the Pennsylvania Superior Court stated in its decision:

> "The Commonwealth is not obligated to call all eyewitnesses, in a criminal prosecution, nor a particular eyewitness, where the District Attorney has reason to believe the eyewitness is unreliable."

The defense at all times was fully aware prior to trial and at the trial that the Commonwealth would not produce the witnesses if they did not honor the subpoenas. The trial court gave a favorable charge to the defense concerning the witnesses. The Commonwealth of Pennsylvania, nevertheless, was able to prove beyond a reasonable doubt the guilt of these defendants. As the Superior Court of Pennsylvania stated in its opinion on this case:

> "Aside from the statements of the defendants, other evidence presented by the Commonwealth shows unequivocally that two abortions, or attempts to commit two abortions, had taken place."

From this record it is apparent that defendants have little to complain about concerning the missing witnesses.

The Petitioners state that the due process will not permit a conviction to stand on the basis of the

evidence which does not support the charge in the indictment, even if the evidence shows the existence of another crime not charged, citing *Stironi v. U. S.*, 361 U.S. 212. But in that case evidence of a crime not charged in the indictment was allowed. Certainly, in the present case, the indictment charges abortion and the evidence proved abortion. In the *Stironi* case, supra, the indictment charged the defendant with interfering with interstate commerce by obstructing the movement of sand. The proof offered also showed the obstruction of the moving of steel in interstate commerce. Certainly, this type of case cannot control the case now before the Court.

Under the circumstances and on the facts involved the Petition for Writ of Certiorari should be denied by the Court.

Respectfully submitted,
DANIEL W. SHOEMAKER,
District Attorney.
JOHN T. MILLER,
First Assistant District Attorney.
LEWIS H. MARKOWITZ,
EARL R. DOLL,
Assistant District Attorneys.
Counsel for Respondent.

Court House
York, Pennsylvania.

APPENDIX

COMPLAINT FOR SEARCH WARRANT

(Copy)

Before me, the subscriber, one of the Aldermen, in and for said County, personally came ROBERT SMITH, PENNA. STATE POLICE of the CITY of HARRISBURG in said county, who upon HIS solemn OATH according to law, saith that FROM INFORMATION RECEIVED WHICH HE BELIEVES at the TOWNSHIP OF HEIDELBERG in the County, aforesaid, THAT THERE IS JUST CAUSE TO SUSPECT THAT ARTICLES AND INSTRUMENTS TO PROCURE ABORTIONS ARE POSSESSED, AND HE HAS JUST CAUSE AND PROBABLE CAUSE TO BELIEVE AND DOES BELIEVE IN A ONE STORY CONCRETE BLOCK RANCH TYPE BUILDING AND LOCATED A SHORT DISTANCE FROM SMITH'S GREEN HOUSES, SHORT DISTANCE FROM TOWNSHIP ROAD T319 AND BEING IN CONTROL OF CARROLL G. HARRISON ALSO KNOWN AS CHRISTOPHER COLUMBUS CAMPBELL AND ALSO KNOWN AS CHARLES C. CAMPBELL.

AFFIANT THEREFORE PRAYS THAT A SEARCH WARRANT MAY ISSUE TO A PROPER OFFICER DIRECTING HIM TO SEARCH SAID PLACE, THING OR THINGS.

ALL THIS IS CONTRARY TO THE ACT OF THE GENERAL ASSEMBLY IN SUCH CASE MADE AND PROVIDED AND AGAINST THE PEACE AND THE DIGNITY OF THE COMMONWEALTH OF PENNSYLVANIA.

ROBERT SMITH

Sworn and subscribed to before me this 21st., day of NOVEMBER, 1958.

H. Gellard Fickes
Alderman.

(Seal)

Same day Warrant issued to Constable

SEARCH WARRANT

(Copy)

Commonwealth of Pennsylvania
County of York, ss:

TO ANY PENNSYLVANIA STATE POLICEMAN IN SAID COUNTY, GREETINGS:

WHEREAS, information and complaint have this day been made to the undersigned authority, an Alderman in and for the City of York, County of York and within the Commonwealth of Pennsylvania, on the oath of Corporal Robert Smith, of the Pennsylvania State Police, Harrisburg, Pennsylvania, that there is just cause to suspect that articles and instruments to procure abortions are possessed in a place described as a one story concrete block, ranch type building and

located a short distance from an establishment known as Smith's Green Houses and also a short distance from Township Road T-319, in Heidelberg Township, York County, Pennsylvania, and being rented by, and in the control of Carroll G. Harrison, also known as Christopher Columbus Campbell, and also known as Charles C. Campbell. These are therefore to command you to make diligent search in the building heretofore described, any parcel thereto, out buildings and conveyances for the articles, devices or instruments to procure abortions and if you find same or any part thereof, that you secure same and bring the person or persons in whose custody you find same before our said Alderman or some other member of the Minor Judiciary to be duly examined concerning the premises and further be dealt with according to law. Witness, our said Alderman in the City of York, County of York and within the Commonwealth of Pennsylvania, who hath hereunto set his hand and seal this 21st. day of November, 1958.

H. Gellard Fickes,
Alderman

Copy made this 8th day of October 1962.

H. Gellard Fickes,
Alderman
Fickes Way &
229 E. Phila. St.,
York, Pa.

My Commission Expires Jan. 1, 1968.